

Internal Revenue Service

memorandum

WHEARD CC:TL:TS

TL-N-7937-89

date: **SEP 22 1989**

to: District Counsel, Houston
Attn: Janet Balboni

SW:HOU

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: Equitable Estoppel Defense to Improper TMP Statute Extension

This memorandum is in response to your memorandum dated June 23, 1989, in which you requested clarification of our litigation position regarding use of equitable estoppel with respect to consents to extend the statute of limitations signed by a former tax matters partner who filed for bankruptcy before executing the consent.

ISSUE

What is Service position with respect to the assertion of equitable estoppel in the situation where the purported TMP, who executes a statute extension on behalf of the partners of a partnership, has previously filed for bankruptcy, thus terminating his status as TMP?

CONCLUSION

Because of the numerous legal and factual problems with asserting equitable estoppel, we will no longer authorize the use of estoppel with respect to such statute extensions. The partner executing a consent on behalf of a partnership must be the TMP in fact, or another person authorized pursuant to Temp. Treas. Reg. § 301.6229(b)-1T to extend the statute.

DISCUSSION

Section 6229(b) provides:

(b) Extension by Agreement.-

(1) **In general.**-The period described in subsection (a) (including an extension period under this subsection) may be extended-

. . . .

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(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.
(emphasis supplied)

Thus, the tax matters partner may extend the period for assessing partnership items on behalf of all partners. Once a tax matters partner files a petition in bankruptcy, however, his partnership items convert to nonpartnership items and his status as TMP terminates. I.R.C. § 6231(c); Temp. Treas. Reg. § 301.6231(c)-7T; Temp. Treas. Reg. § 301.6231(a)-7(1)(4).

If the former TMP now executes a statute extension "as tax matters partner" on behalf of all partners of the partnership, a question arises as to whether the Service may raise equitable estoppel to prevent the partnership from claiming as an affirmative defense that the extension is invalid and the statute of limitations for assessing partnership items has expired.

The use of estoppel has been addressed in previous tax litigation advice memoranda with respect to TEFRA partnerships. The earlier memoranda concluded that an estoppel defense could be used where (1) a statement of fact was made which was otherwise unknown to the Service; (2) the Service reasonably relied on the statement of fact; and (3) the Service suffered a detriment by its reasonable reliance. Since the above defense can normally only be used against the person making the misstatement, in the context of a TEFRA partnership case, the partners other than a purported TMP would also have to make false statements (or at least fail to object when made aware of the false statement) in order for this doctrine to apply to them. See Piarulle v. Commissioner, 80 T.C. 1035 (1983). Cf. Barbados # 7, Ltd. v. Commissioner, 92 T.C. No. 47 (April 17, 1989) (estoppel may apply where Service is not informed of TMP bankruptcy, thus making reliance reasonable) (dicta).

As a practical matter, the Service's reliance would rarely be reasonable, since, when a TMP files for bankruptcy, this information is usually provided to the Service by the bankruptcy court and placed in the Internal Revenue Service master file computer. Thus, as an institution, the Service is normally aware of the bankruptcy filing even if the Service representative securing a statute waiver is not. Furthermore, in a recent hearing the Court has stated that it expects the Service representative securing a consent to ask the purported TMP whether he has filed for bankruptcy.

Finally, only the bankrupt partner usually makes the representation that he is the TMP. Since a bankrupt partner's partnership items convert to non-partnership items, the only one making the misstatement is not even a party to the partnership proceeding. I.R.C. § 6226(d)(1)(A). Thus, there is normally no party to a TEFRA proceeding against whom we can assert an estoppel defense.

Because of the numerous legal and factual problems with asserting the doctrine of equitable estoppel, we will no longer authorize the use of estoppel with respect to statute extensions by a terminated TMP. The person executing a consent on behalf of a partnership must be the TMP in fact,^{1/} or another person authorized pursuant to Temp. Treas. Reg. § 301.6229(b)-1T to extend the statute.^{2/} Otherwise the consent will be invalid.

^{1/} Note that we have authorized the use of an equitable estoppel as an alternative argument to support the validity of a pre-regulation designation of TMP which substantially complied with the later regulation. We are not willing to authorize the use of equitable estoppel in other situations, however.

^{2/} Section 301.6229(b)-1T provides:

Extension by agreement.-Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall-

(a) Provided that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners,

(b) Identify the partnership and person being authorized by name, address, and taxpayer identification number,

(c) Specify the partnership taxable year or years for which the authorization is effective, and

(d) Be signed by all persons who were general partners at any time during the year or years for which the authorization is effective.

Please refer any questions you may have on this matter to
Bill Heard at FTS 566-3233.

MARLENE GROSS

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